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In the

Supreme Court of the United States

October Term, 1940

No. 59.

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J. LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO LOPERENA and SEBASTIANA LOPERENA.

SUPPLEMENT TO BRIEF ON CERTIORARI.

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Explanatory Statement.

This supplement to petitioner's brief on certiorari is predicated upon the hypothesis that the Circuit Court of Appeals (Ninth Circuit) did have jurisdiction to entertain Bowman's appeal on the merits. Therefore, we will herein confine ourselves to the merits of the original appeal from the adjudication and order of reference.

Supplemental Statement of Facts.

Stanley T. Howe, Referee in Bankruptcy (in San Diego, California), on August 19, 1936, after certain hearings on the extension proposal of the debtor herein, prepared and forwarded to the clerk of the District Court at Los Angeles, California, a document entitled "Certificate of Referee on Debtor's Petition for Extension". This document was filed by said clerk on August 21, 1936 [Tr. of Record, pp. 19-24]. Said certificate reflects [Tr. of Record, p. 24] the following important and unusual language:

> "I therefore *recommend* that the proposal or proposals of the debtor for an extension under section 74 of the Bankruptcy Act *be not confirmed* and that the debtor be adjudged a bankrupt." (The italics are ours.)

The Honorable Albert Lee Stephens, District Judge, pursuant to and entirely based on said certificate, "ordered that the clerk make and sign Order of Adjudication and Reference in the following case: 1048 Lamont William Bowman." [Tr. of Record, pp. 17-18.] This adjudication, which was thereafter filed with the clerk of the District Court, is the subject matter of this appeal.

Bowman, on August 27, 1936, filed his petition for review of referee's order [Tr. of Record, pp. 27-28.]

Referee Howe, on September 24, 1936, filed another document (bearing no date) with the clerk of the District Court, entitled "Statement of Referee on Petition of Debtor for Review." [Tr. of Record, pp. 25-26.] Part of this statement is of great importance herein; it reads as follows:

> "Said petition for review, with the supplemental proposal for extension which is made a part thereof, is herewith returned to your Honorable Court *without* a statement and certificate for review for the reason that the undersigned as Referee in Bankruptcy, *has made no order the review of which is sought in this proceeding by the debtor.*" (The italics are ours.)

Question Involved.

I.

Can an adjudication and order of reference made by a bankruptcy court, in excess of and contrary to the authority and jurisdiction expressly granted to said court by the National Bankruptcy Act and the general orders in bankruptcy, have any validity?

ARGUMENT.

Powers of the Bankruptcy Court.

Courts of bankruptcy are of statutory origin and possess only such limited jurisdiction as are expressly conferred upon them by the National Bankruptcy Act and by the General Orders in Bankruptcy. This rule of law is fundamental and is established by a legion of federal authorities—we quote from a few of them, as follows:

Jones v. Kansas City Garment Making Company, 1 Fed. (2d) 649:

"Courts of bankruptcy are of statutory origin and possess only such jurisdiction as are expressly or by necessary implications conferred upon them by the National Bankruptcy Act. . . . The order of the bankruptcy court . . . being predicated upon the findings made by the referee without jurisdiction to act was properly set aside by the bankruptcy court."

C. C. Taft Co. v. Century Savings Bank (C. C. A. 8), 141 Fed. 369:

"The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction."

Windsor v. McVeigh, 93 U. S. 274, at page 282:

"All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of action, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable, or to transactions of a special

character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments.

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.

". . . So a departure from established modes of procedure will often render the judgment void; . . . . and the reason is, that the courts are not authorized to exert their power in that way.

". . . The doctrine . . . . is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it."

Nixon v. Michaels (C. C. A. 8), 38 Fed. (2d) 420:

"A District Court of the United States, sitting as a court of bankruptcy is a court of limited jurisdiction . . . The express provisions of the statute and the necessary implications are controlling."

Wheeling Structural Steel Co. v. Moss (C. C. A. 4), 62 Fed. (2d) 37:

"The jurisdiction of a court of bankruptcy is of a limited character, statutory in its origin, and it covers only such matters as are specified in the statute, and they must be dealt with as the statute directs"—citing *In Re Hollins,* 229 Fed. 833; *In Re Stearns v. White,* 295 Fed. 833.

Hence, we maintain that the only authority under which the bankruptcy court could have made a valid adjudication and order of reference must be found in one of the following statutes (Grants of Power):

(A) *General Orders in Bankruptcy,* as adopted by the Supreme Court of the United States, Nov. 28, 1898; and as amended April 24, 1933; and June 1, 1936.

(B) Section 38 (*Jurisdiction of Referees*), (11 U. S. C. A. 66), of the National Bankruptcy Act.

(C) Section 39 (*Duties of Referees*), (11 U. S. C. A. 67.)

(D) Section 74 (*Provisions for Relief of Debtors*), (11 U. S. C. 202), added to the Bankruptcy Act by Act of March, 1933, and as amended June 7, 1934.

We will show that the express provisions of the foregoing statutes were not complied with by the referee or by the court. We will also show that the adjudication and order of reference, dated August 21, 1936, was in excess of and contrary to the power, authority or jurisdiction granted to the court and therefore it was void *ab initio.*

All of which leads to the inevitable conclusion that authority of the court, to adjudicate a debtor a bankrupt, is not an arbitrary power, but, on the contrary, is a limited power conferred solely by statute (section 74 of the National Bankruptcy Act and Chapter XII of the General Orders in Bankruptcy) and any adjudication not based on statute is void.

Duties (Powers) of the Bankruptcy Referee.

The referee in bankruptcy has only such powers as are given to him by the National Bankruptcy Act, General Orders in Bankruptcy, the order of reference or as specifically delegated to him by a Judge of the Bankruptcy Court.

The "Duties of Referee", here pertinent, are set forth in Chapter XII of *General Orders in Bankruptcy,* as amended April 24, 1933, and June 1, 1936, as follows:

> 1. The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee and from that day the bankrupt or debtor shall be subject to the orders of the court in all matters relating to the proceedings, and may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of a composition or extension proposal. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. *And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the Judge, shall be had before the referee.*

2. The time when, and place where, the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; *and at such times and places the referees may perform the duties which they are empowered by the Act to perform.*

3. Applications for a discharge, or for the confirmation of a composition where the proceeding is had under Section 12 of the Act, or for an injunction to stay proceedings of a court or office of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee, or in proceedings under Section 77, and Section 77B of the Act, to a special master, to ascertain and report the facts. *Unless otherwise ordered by the Judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto, shall be heard and decided by the referee.* (The italics are ours.)

The foregoing excerpts from Chapter XII of the General Orders in Bankruptcy require—mandatorily require—the referee to *hear and decide* the application for the confirmation of debtor's proposal under section 74 of the National Bankruptcy Act. The referee, in the instant case, did not *hear and decide* said application; on the contrary, he *recommended* that the debtor's proposal be not confirmed—such recommendation was contrary to the distinct provisions of the statutes and in excess of the powers conferred by the National Bankruptcy Act itself.

An extremely well-reasoned case, holding that the referee has only the powers expressly conferred by statute, court order of reference, order in bankruptcy, or General

Orders, is *In Re Faerstein* (C. C. A. 9), 58 Fed. (2d) 942, where, at page 943, the court said:

> "(1, 2) Referees are invested with certain powers, 'subject always to review by the judge'; Section 66, Title 11, U. S. C. A. The referee has no independent judicial authority. He is not a distinct court, and has no power not conferred by order of reference, by law, or General Orders. 'The District Court of the United States in the several states . . . are made courts of bankruptcy.' 11 U. S. C. A. Sec. 11. . . . 'A referee is an instrumentality of the court with limited powers. His jurisdiction is confined by Section 66, Title 11, U. S. C. A. *supra,* and his duties are given in section 67.
>
> "General Order No. 27 of the Supreme Court (11 U. S. C. A. 53) provides that, when a review is sought of any order of the referee, a petition shall be filed with the referee setting forth the error complained of and the referee shall certify to the United States District Judge the question presented, a summary of the evidence, and finding and order of the referee thereon. The procedure is specific and clearly stated . . ."

In the case at bar the referee not only failed to comply with the procedure as to the manner of the adjudication, but he also failed to comply with one of the fundamental jurisdictional pre-requisites—to deny confirmation of debtor's proposal.

To the same effect is the case of *Chandler v. Perry* (C. C. A. 5), 74 Fed. (2d) 371, where the court said, on page 373:

> "The referee is not the court of bankruptcy, but an officer of it. He has such powers as the act and

the order of reference given him, or as the judge specifically delegates to him. *Weidhorn v. Levy,* 253 U. S. 268, 40 S. Ct. 534, 64 L. Ed. 898 These powers, however, are so broad that the act declares that in its provisions the word 'court' may include the referee. Section 1 (7) of the Act (11 U. S. C. A. Sec. 1 (7).) *MacDonald v. Plymouth County Trust Co.,* 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093. In stating his jurisdiction, the Act, in section 38(4) of the Act (11 U. S. C. A. Sec. 66 (4),) provides that he may 'perform such part of the duties, except as to the questions arising out of the applications of bankrupts for composition or discharge, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy, except as herein otherwise provided.' *General Order* 12(1), 11 U. S. C. A. Sec. 53 provides that after the reference of a case to the referee the bankrupt shall attend before him and 'thereafter all of the proceedings except such as are required by the Act or by these General Orders to be had before the judge shall be had before the referee.' "

The leading case of *Weidhorn v. Levy,* 253 U. S. 268, most ably discusses the question of whether the referee exceeded the authority and jurisdiction conferred upon him by the Bankruptcy Act and the General Orders of Reference, in this language:

"Referees respectively are hereby invested, subject always to a review by the judge . . . with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the

courts of bankruptcy of their respective districts, except as herein otherwise provided.

"These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent juridicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the Act; and that his judicial functions, however important, are subject to the review of the bankruptcy court. In the general orders established by this court pursuant to the Act under Section XII(1) provision is made for an order referring a case to a referee . . . and thereafter all the proceedings, except such as are required by the Act or by these General Orders to be before the judge shall be had before the referee." (172 U. S. 657.)

The case of *In re McMurray,* ? Fed. Supp. 449, holds:

"The power and author. of the court, the judge, the commissioner, or referee, and of other officers, is limited to the authority granted by the Act itself."

The mandatory requirement that the referee *hear and decide* applications for the confirmation of a debtor's proposal under section 74 of the National Bankruptcy Act is jurisdictional. The power to *hear and decide* obviously means that the referee is required to hear and decide by making his order based on his said decision.

No order was made by the referee, prior to adjudication; therefore the District Judge was without power, authority or jurisdiction to make and enter an order adjudicating Bowman a bankrupt, particularly when such order was based on a void recommendation of the referee.

The Referee Could Not Have Acted as a Special Master.

Referee Howe must have attempted to assume the functions of a special master, although he was never so appointed. This assumption appears to be the only one that could legitimately result in said referee's use of the word "recommendations; but such premise is untenable when it is realized that he could not act as a special master in the absence of a specific order of the court authorizing him so to act.

Paragraph 3, Chapter XII of *General Orders in Bankruptcy,* provides the judge may refer an application under section 77 or 77B of the *National Bankruptcy Act* to a special master to ascertain and report the facts—but this provision can only be effective when the District Judge has made an order authorizing such appointment. There is, however, no provision for an appointment of a special master under section 74 of the Act; on the contrary, under Chapter XII of the *General Orders in Bankruptcy,* it becomes the duty of the referee to hear and decide applications for the confirmation of a debtor's proposal under section 74 of the Act.

The Provisions of Section 74 of the National Bankruptcy Act Preclude an Adjudication and Order of Reference Herein.

The only powers granted to bankruptcy courts are set forth in the Act itself.

Subdivision "L" of section 74 of the *National Bankruptcy Act,* provides the only method by which an adjudication can be made and entered.

Section 74 of the Act provides that the court may appoint the trustee nominated by the creditors at the first

meeting, and if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate,

IF:

(1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or

(2) the debtor has failed to make the required deposit in case of a composition; or

(3) the debtor's proposal has not been accepted by the creditors; or

(4) confirmation has been denied; or

(5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of the debtor or his property."

The following additional excerpt from this section is of exceeding importance to this appeal:

"The Court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceedings for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied." (The italics and underlining are ours.)

The court could not have acquired jurisdiction to make or enter its order adjudicating the debtor a bankrupt, unless one of two contingencies were present:

First: the court must have found and *been satisfied* that the debtor commenced or prolonged the proceedings for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or

Second: the confirmation of debtor's proposal had been denied.

Re First Contingence.

There is no finding herein that the debtor "commenced or prolonged the proceedings for the purpose of avoiding an adjudication—on the contrary, there is, in the Engrossed Statement of Evidence [Tr. of Record, pp. 122-124], prepared July 5th, 1938, under the supervision of Stanley T. Howe, referee [Tr. of Record, p. 120], and approved by the District Judge as correct [Tr. of Record p. 142], a finding that "that in none of the Certificates of the Referee or the Orders made by the Referee, pursuant to the evidence introduced at all of said proceedings and heard and considered by the Referee, is there any finding that the debtor 'commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy.'" [Tr. of Record p. 141]. Hence, the first contingency was not present.

It should again be noted, at this point, that the adjudication and order of reference by the District Judge was predicated solely upon the void "recommendation" of the referee [Tr. of Record p. 17].

Re Second Contingency.

Section 74 of the Act, in authorizing an adjudication distinctly provides that "the Court Shall in Addition" adjudge the debtor a bankrupt if "confirmation has been denied."

It has been herein shown the confirmation of the debtors proposal was not denied at the time the adjudication and order of reference was made and entered. Hence, the second contingency was not present.

Therefore, the court was in error when it "ordered that the clerk make and sign order of adjudication and reference" because the necessary jurisdictional elements were lacking. This being true, the adjudication itself is void *ab initio* and no subsequent act or order of the court could breathe life into it.

The order of October 25, 1937, by District Judge Neterer directing the referee to proceed under the order and reference, dated August 21, 1936, [Tr. of Record pp. 87-88] specifically referred to the original adjudication and order of reference. Therefore, it likewise was void. The original adjudication being void, no subsequent order based thereon could be valid.

Conclusion.

We respectfully maintain that we have established that the court was without power, authority or jurisdiction to have "ordered that the clerk make and sign Order of Adjudication and Reference." We have shown that said order, as based upon the "recommendation" of the referee was void *ab initio*.

We respectfully urge that the adjudication and order of reference be vacated and set aside, that appellant be restored to *status quo* as of the date of the void adjudication and for such other relief as may seem meet and proper to this Honorable Court.

Respectfully submitted,

L. A. Luce,
Counsel for Petitioner.

J. Earl Haskins,
As of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 59.—October Term, 1940.

Lamont William Bowman, Petitioner,
vs.
Martin Lopereno, Georgia Lopereno and Martin J. Lopereno, et al.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

The sole question for decision is whether the Circuit Court of Appeals properly dismissed as untimely an appeal from an order made by a District Court sitting in bankruptcy.

The proceeding was initiated by the petitioner, hereinafter spoken of as the debtor, in the District Court, for an extension under § 74 of the Bankruptcy Act as amended.[1] The petition, filed May 23, 1935, was referred to a referee, who denied it July 26, 1935. May 15, 1936, the court, on petition for review, re-referred the cause to a referee, who, on August 19, 1936, filed his certificate with the court in which he concluded: "I therefore recommend that the proposal or proposals of the debtor for an extension under § 74 of the Bankruptcy Act be not confirmed, and that the debtor be adjudicated a bankrupt."

August 21, 1936, the District Court, reciting the referee's recommendation, made an order adjudicating the debtor a bankrupt and again referring the cause to the referee for further proceedings in bankruptcy.

August 28, 1936, the debtor prayed a review and the referee certified the matter to the court. In the petition for review both the action of the referee in reporting his recommendations instead of granting or dismissing the petition for extension, and the action of the court on the referee's report adjudicating the

[1] Act of March 3, 1933, c. 204 Sec. 1, 47 Stat. 1467; Act of June 7, 1934, c. 424 Sec. 2, 48 Stat. 922, 923; 11 U. S. C. (1934) § 202.

debtor a bankrupt, were challenged. September 10, 1936, the debtor filed a petition for rehearing of the order of adjudication, praying that it be vacated and the cause reheard. October 14, 1936, motion was filed by the debtor, after due notice to the parties in interest, praying that the order of adjudication be vacated and the proceeding dismissed without prejudice.

October 16, 1936, a district judge heard the motion for rehearing and the motion to vacate the adjudication and entered an order that the entire matter of the debtor's petition for extension which was re-referred to the referee May 15, 1936, be again re-referred to him with direction to hear and consider the petition for extension and any supplemental petition, and to make an order or orders thereon as provided by the Act and the General Orders, and continuing: "it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof." It will be observed that the court did not finally dispose of the petition and motion so far as they were directed to the adjudication of the debtor.

Proceedings on a supplemental proposal of extension were had before the referee from time to time and eventuated, on June 14, 1937, in an order denying the petition for extension. The debtor presented a petition for review to the referee July 15, 1937, and thereupon the latter made and forwarded to the court his certificate reciting the proceedings and certifying the evidence. The matter came on for hearing before the District Court and, on October 25, 1937, a judge of that court confirmed the order of the referee and ordered that the stay of proceedings under the order of adjudication of August 21, 1936, should be vacated and that the referee should proceed to perform his duties under the adjudication and order of reference.

November 15, 1937, the debtor filed a petition for rehearing in which he asked, *inter alia*, that the adjudication in bankruptcy be vacated and set aside. On the same day a judge of the District Court endorsed upon the petition:

"This petition having been 'seasonally presented' and 'entertained' by the above entitled court, permission to file same is hereby granted."

The petition for rehearing was heard by a judge of the District Court and, on February 17, 1938, he rendered his opinion and made an order thereon. In the opinion he said:

"This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate."

His order was: "The petition for review is denied."

March 18, 1938, an appeal to the Circuit Court of Appeals was allowed by the District Court. In his petition for appeal the debtor stated that he "does hereby appeal . . . from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, . . . ". His first assignment of error was to the order of adjudication.

The court below dismissed the appeal[2] in the view that, while it was taken within thirty days of the order denying the petition for rehearing, it came too late because the adjudication was entered August 21, 1936, and the time for appeal therefrom expired thirty days thereafter unless the running of time for taking appeal was suspended by application for rehearing. The court construed the petition for rehearing of September 10, 1936, as directed rather to the action of the referee than to the order of adjudication, but that petition, as we have seen, recited the adjudication, alleged that it was erroneous, and prayed that it be vacated. This position was reiterated in the motion of October 14, 1936, and both the petition and the motion were heard together and were the basis of the order of October 16, 1936, re-referring the case and staying the effective date of the adjudication until the further order of the court.

As appears from the order of October 25, 1937, the District Judge understood that the question of the propriety of the adjudication was before him and dealt with it in his denial of the petition. Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and the hearing held and opinion announced

[2] In re Bowman, 110 F. (2d) 348.

upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.

These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal.[3] But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.[4]

We hold that the court below should have entertained the appeal.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[3] Morse *v.* United States, 270 U. S. 151, 153, 154; Wayne United Gas Co. *v.* Owens-Illinois Glass Co., 300 U. S. 131, 137.

[4] Voorhees *v.* John T. Noye Mfg. Co., 151 U. S. 135, 137; Gypsy Oil Co. *v.* Escoe, 275 U. S. 495, 499; Wayne United Gas Co. *v.* Owens-Illinois Glass Co., *supra*, 137, 138.